

2011 Montana Legislature

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SENATE BILL NO. 379

INTRODUCED BY A. OLSON

A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING COUNTY ZONING LAWS;
REVISING PROCEDURES FOR THE ESTABLISHMENT OR REVISION OF BOUNDARIES FOR
A ZONING DISTRICT AND THE ADOPTION OR AMENDMENT OF ZONING REGULATIONS;
CLARIFYING ZONING PROTEST REQUIREMENTS; PROVIDING THAT A BOARD OF
COUNTY COMMISSIONERS MAY VOTE TO OVERRIDE A SUCCESSFUL PROTEST UNDER
CERTAIN CIRCUMSTANCES; REQUIRING THE BOARD OF COUNTY COMMISSIONERS TO
DEVELOP FINDINGS OF FACT TO OVERRIDE A ZONING PROTEST; CLARIFYING
PROCEDURES FOR THE ADOPTION OF ZONING REGULATIONS AND BOUNDARIES;
~~SUPERSEDING THE UNFUNDED MANDATE LAWS; AMENDING SECTIONS 76-2-101 AND~~
~~76-2-205, MCA; AND PROVIDING A CONTINGENT EFFECTIVE DATE."~~

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WHEREAS, exercise of the police power by a governmental entity must be balanced against
the legitimate use of private property and other constitutional protections, including Article II,
section 29, of the Montana Constitution, which prohibits the taking of private property for a public
use without just compensation; and

WHEREAS, the government in its exercise of the police power may not disproportionately
require some property owners to bear the burdens of advancing the public health, safety, morals,
and general welfare when such burdens should be borne by the public as a whole; and

WHEREAS, private property rights may be negatively affected by zoning regulations, districts,
and amendments that restrict allowable land uses and reduce the value of property; and

~~WHEREAS, the government should establish through public record whether there may be a
diminution in value of affected property from proposed zoning regulations, districts, and
amendments and whether the expected benefits are proportional to the probable impacts; and~~

~~WHEREAS, the government should consider alternatives or modifications when alternatives or
modifications would mitigate adverse economic impacts and unreasonable limitations on affected
property; and~~

1 WHEREAS the government should rely on credible evidence established through the public
2 record to support the proposed zoning regulations, districts, and amendments as a means to
3 protect the public health, safety, morals, and general welfare.
4

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

6
7 **NEW SECTION. Section 1. Purpose.** The purpose of [sections 1, 2, and 4 through 9] is to
8 protect real property owners from unreasonable land use restrictions and reductions in land value
9 due to county zoning by:

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10 (1) ensuring that owners of real property affected by a proposed zoning action have the right
11 to protest;

12 (2) providing that a board of county commissioners may not proceed with a zoning action if
13 there is a successful protest except under certain circumstances;

14 (3) providing additional procedures for factfinding and public involvement if a board of county
15 commissioners seeks to override a successful protest; and

16 (4) clarifying that owners of real property affected by a zoning action may challenge the zoning
17 action in a court of competent jurisdiction.
18

19 **NEW SECTION. Section 2. Definitions.** For purposes of [sections 1, 2, and 4 through 9],
20 the following definitions apply:

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21 (1) (a) "Affected real property" means property taxed on an ad valorem basis on the county tax
22 rolls and directly subject to a proposed zoning action.

23 (b) The term does not include adjoining or neighboring property.

24 (2) "Affected real property owner" means the owner of affected real property, including natural
25 persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any
26 other legal entity owning land in fee simple, as joint tenants, or as tenants in common.

27 (3) (a) "Fair market value" means the price that would be agreed to by a willing and informed
28 seller and buyer, taking into consideration the highest and best reasonably available use of the
29 property, the value of that use, and any other relevant factors for which evidence is offered.

30 (b) Current use may not be presumed to be the highest and best use."

31 (4) "Protest override procedure" means the procedures described in [sections 6 through 9].

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1 (5) "Protesting landowner" means an affected real property owner who protests a zoning
2 action.

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3 (5) "Successful protest" means a protest by owners of 40% or more of the affected real
4 property.

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5 (7) "Zoning action" means the establishment or revision of boundaries for a zoning district and
6 any adoption or amendment of zoning regulations.

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7
8 **Section 3.** Section 76-2-101, MCA, is amended to read:

9 **"76-2-101. Planning and zoning commission and district.** (1) Subject to the provisions of
10 ~~subsection (5)~~ [section 5], whenever the public health, safety, morals, or general welfare may
11 require and upon petition of 60% of the affected real property owners in the proposed district, the
12 board of county commissioners may create a planning and zoning district and appoint a planning
13 and zoning commission consisting of seven members.

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14 (2) A planning and zoning district may not be created in an area that has been zoned by an
15 incorporated city pursuant to 76-2-310 and 76-2-311.

16 (3) For the purposes of this part, the word "district" means any area that consists of not less
17 than 40 acres.

18 (4) Except as provided in ~~subsection (5)~~ [section 5], an action challenging the creation of a
19 planning and zoning district must begin within 6 months after the date of the order by the board of
20 county commissioners creating the district.

21 ~~(5) If real property owners representing 50% of the titled property ownership in the district~~
22 ~~protest the establishment of the district within 30 days of its creation, the board of county~~
23 ~~commissioners may not create the district. An area included in a district protested under this~~
24 ~~subsection may not be included in a zoning district petition under this section for a period of 1~~
25 ~~year."~~

26
27 **NEW SECTION. Section 4. Procedures -- zoning action.** The board of county
28 commissioners shall observe the following procedures for taking a zoning action:

29 (1) Notice of a public hearing on the proposed zoning action must:

30 (a) state:

31 (i) the boundaries of the proposed district that would be affected by the zoning action;

- 1 (ii) the general character of the proposed zoning action;
2 (iii) the time and place of the public hearing;
3 (iv) that the proposed zoning action is on file for public inspection at the office of the county
4 clerk and recorder;
5 (v) a description of the public health, safety, morals, and general welfare that the board of
6 county commissioners is seeking to protect through the proposed zoning action;
7 (b) be posted not less than 45 days before the public hearing in at least five public places,
8 including but not limited to public buildings and adjacent to public rights-of-way within the
9 proposed district; and
10 (c) be published in accordance with 7-1-2121.

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a newspaper of general circulation
within the county

11 (2) At the public hearing, the board of county commissioners shall give the public an
12 opportunity to be heard regarding the proposed zoning action.

13 (3) After the public hearing, the board of county commissioners shall review the proposed
14 zoning action and make any revisions or amendments that it determines to be proper based upon
15 the public comment and the record.

16 (4) The board of county commissioners may pass a resolution of intention to take a zoning
17 action.

18 (5) The board of county commissioners shall publish notice of passage of a resolution of
19 intention to take a zoning action in accordance with 7-1-2121. The notice must state:

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within the county

20 (a) the boundaries of the proposed district;

21 (b) the general character of the proposed zoning action;

22 (c) a description of the public health, safety, morals, and general welfare that the board of
23 county commissioners is seeking to protect; and

24 (d) that for 45 days after the date that notice of the resolution of intention to adopt a proposed
25 zoning action is first published, the board of county commissioners will receive written protests to
26 the zoning action from affected real property owners.

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27
28 **NEW SECTION. Section 5. Protest.** (1) Within 45 days of the date that notice of passage of
29 the resolution of intention to take a zoning action pursuant to [section 4] is first published, affected
30 real property owners may protest the proposed zoning action by delivering written notification to
31 the board of county commissioners.

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1 (2) If a successful protest is not achieved, the board of county commissioners may in its
2 discretion proceed with the proposed zoning action within 30 days of the expiration of the protest
3 period.
4

5 **NEW SECTION. Section 6. Override of successful protest.** (1) (a) Following a successful
6 protest, a board of county commissioners may in its discretion either abandon the proposed
7 zoning action or, subject to [sections 6 through 9], override a successful protest and adopt the
8 proposed zoning action by:

9 (i) a unanimous affirmative vote of the county commissioners in counties with three
10 commissioners;

11 (ii) an affirmative vote of at least four county commissioners in counties with five
12 commissioners; or

13 (iii) an affirmative vote of at least two-thirds of the county commissioners in counties with more
14 than five commissioners.

15 (b) A commissioner may not abstain from voting unless a proven conflict of interest exists as
16 determined by the county attorney.

17 (2) If the protest override procedure is not successful, the board of county commissioners may
18 not adopt the proposed zoning action and a subsequent proposal for a zoning action may not be
19 proposed for the affected real property for a period of 1 year.

20 (3) Prior to holding a vote to override a successful protest, a board of county commissioners
21 must:

22 (a) accept evidence and prepare findings of fact on the potential economic impact of the
23 proposed zoning action on the property values of protesting landowners; and

24 (b) accept evidence and prepare findings of fact on whether no less restrictive means exist to
25 protect the public health, safety, morals, and general welfare of the residents of the county.

26 (4) The board of county commissioners shall complete the findings of fact within 30 days of the
27 public hearing and shall provide written notice to all affected real property owners of its findings
28 within 40 days of the public hearing.
29

30 **NEW SECTION. Section 7. Evidence of economic impact.** (1) In accepting evidence of
31 economic impact pursuant to [section 6], the board of county commissioners shall allow any

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1 interested person to submit relevant evidence of the potential economic impact of the proposed
2 zoning action on the fair market value of the property of protesting landowners. Interested
3 persons may submit any relevant evidence, including but not limited to:

4 (a) evidence regarding the fair market value of property owned by protesting landowners and
5 any diminution in the fair market value of the property that may result from the proposed zoning
6 action;

7 (b) evidence regarding reduction in types of allowable land use that may occur as a result of
8 the proposed zoning action;

9 (c) evidence regarding whether the proposed zoning action deprives protesting landowners of
10 economically viable uses of the protesting landowners' property; and

11 (d) evidence regarding whether the expected benefits of the proposed zoning action are
12 proportional to the probable impacts of the proposed zoning action on the property of protesting
13 landowners.

14 (2) The board of county commissioners shall give due weight and consideration to any
15 evidence submitted pursuant to subsection (1).

16 (3) (a) If the protesting landowners submit credible evidence showing that the proposed zoning
17 action will result in a 30% or more diminution in the aggregate value of all of the protesting
18 landowners' affected real property, a prima facie negative impact is established.

19 (b) Upon the establishment of a prima facie negative impact, the burden shifts to the board of
20 county commissioners to determine whether credible evidence has been submitted establishing
21 that the expected benefits of the proposed zoning action outweigh the diminution in the aggregate
22 value of all of the protesting landowners' affected real property,

24 **NEW SECTION. Section 8. Evidence of no less restrictive means.** (1) In accepting
25 evidence of whether no less restrictive means exist to protect the public health, safety, morals,
26 and general welfare pursuant to [section 6], the board of county commissioners shall allow any
27 interested person to submit any relevant evidence regarding alternatives to the proposed zoning
28 action or mitigating modifications to the proposed zoning action.

29 (2) The board of county commissioners shall give due weight and consideration to any
30 evidence submitted pursuant to subsection (1).

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commissioners is unable to determine
by credible evidence that the
expected benefits of the proposed
zoning action outweigh the diminution
in value of the property owned by the
protesting landowner, the board of
county commissioners may not adopt
the proposed zoning action.¶

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to:¶

(a) alternatives to the proposed
zoning action to further the public
health, safety, morals, and general
welfare; and¶

(b) modifications to the proposed
zoning action that would mitigate
adverse economic impacts or mitigate
unreasonable limitations on land uses
on the property owned by a protesting
landowner

1 (3) If the board of county commissioners finds that ~~alternatives or mitigating modifications may~~
2 ~~be implemented~~ to protect the public health, safety, morals, and general welfare, the board ~~shall~~
3 ~~modify the proposed zoning action to incorporate the alternatives or mitigating modifications.~~

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5 **NEW SECTION. Section 9. Findings -- public notice and comment.** (1) The board of
6 county commissioners shall hold a public hearing to accept public comment regarding the protest,
7 the evidence submitted on the economic impact of the proposed zoning action, and the evidence
8 submitted on whether no less restrictive means than the proposed zoning action exist.

9 (2) Notice of the public hearing required in subsection (1) must include:

10 (a) a summary of the evidence submitted to the board of county commissioners on the
11 economic impact of the proposed zoning action and on whether no less restrictive means than
12 the proposed zoning action exist;

13 (b) the potential impact of the evidence submitted to the board of county commissioners on the
14 property of protesting landowners;

15 (c) the time and place of the public hearing;

16 (d) that the evidence submitted to the board of county commissioners pursuant to [sections 7
17 and 8] is on file for public inspection at the office of the county clerk and recorder.

18 (3) Notice of the public hearing required in subsection (1) must be:

19 (a) posted not less than 45 days before the public meeting and in at least 5 public places,
20 including but not limited to public buildings and adjacent to public rights-of-way within the
21 proposed district or on the land affected by the proposed zoning action;

22 (b) published ~~in accordance with 7-1-2121;~~ and

23 (c) ~~mailed pursuant to 7-1-2122 to each owner of affected real property.~~

24 (4) The board of county commissioners shall issue written findings of fact upon conclusion of
25 the public hearing pursuant to subsection (1).

26 (5) The written findings of fact provided by the board of county commissioners pursuant to this
27 section may be appealed as provided in 76-2-110 ~~or in 76-2-227~~. An affected real property owner
28 has 30 days from the date the owner receives notice of the written findings ~~mailed pursuant to 7-~~
29 ~~1-2122 to appeal.~~

30
31 **Section 10.** Section 76-2-205, MCA, is amended to read:

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Deleted: The written findings of fact must include findings regarding:¶

(a) the estimated percentage, if any, of diminution in value of the property owned by a protesting landowner;¶

(b) any reduction in types of allowable land use on the property owned by a protesting landowner;¶
(c) whether the proposed zoning action deprives a protesting landowner of economically viable uses of the affected property;¶

(d) whether the expected benefits of the proposed zoning action are proportional to the probable impacts of the proposed zoning action;¶

(e) whether alternatives to the proposed zoning action exist to protect the public health, safety, morals, and general welfare;¶

(f) whether modifications to the proposed zoning action exist that would mitigate adverse economic impacts or mitigate unreasonable limitations on land uses on property owned by protesting landowners; and¶

(g) whether credible evidence exists to dispute the rationale used to support the proposed zoning action as a means to protect the public health, safety, morals, and general welfare.

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1 **"76-2-205. Procedure for adoption of regulations and boundaries.** The board of county
2 commissioners shall observe the following procedures for taking a zoning action provided in
3 [section 4] in the establishment or revision of boundaries for zoning districts and in the adoption
4 or amendment of zoning regulations:.

5 ~~(1) Notice of a public hearing on the proposed zoning district boundaries and of regulations~~
6 ~~for the zoning district must:~~

7 ~~—(a) state:~~

8 ~~—(i) the boundaries of the proposed district;~~

9 ~~—(ii) the general character of the proposed zoning regulations;~~

10 ~~—(iii) the time and place of the public hearing;~~

11 ~~—(iv) that the proposed zoning regulations are on file for public inspection at the office of the~~
12 ~~county clerk and recorder;~~

13 ~~—(b) be posted not less than 45 days before the public hearing in at least five public places,~~
14 ~~including but not limited to public buildings and adjacent to public rights of way, within the~~
15 ~~proposed district; and~~

16 ~~—(c) be published once a week for 2 weeks in a newspaper of general circulation within the~~
17 ~~county.~~

18 ~~—(2) At the public hearing, the board of county commissioners shall give the public an~~
19 ~~opportunity to be heard regarding the proposed zoning district and regulations.~~

20 ~~—(3) After the public hearing, the board of county commissioners shall review the proposals of~~
21 ~~the planning board and shall make any revisions or amendments that it determines to be proper.~~

22 ~~—(4) The board of county commissioners may pass a resolution of intention to create a zoning~~
23 ~~district and to adopt zoning regulations for the district.~~

24 ~~—(5) The board of county commissioners shall publish notice of passage of the resolution of~~
25 ~~intention once a week for 2 weeks in a newspaper of general circulation within the county. The~~
26 ~~notice must state:~~

27 ~~—(a) the boundaries of the proposed district;~~

28 ~~—(b) the general character of the proposed zoning regulations;~~

29 ~~—(c) that the proposed zoning regulations are on file for public inspection at the office of the~~
30 ~~county clerk and recorder;~~

1 | —(d) that for 30 days after first publication of this notice, the board of county commissioners will
2 receive written protests to the creation of the zoning district or to the zoning regulations from
3 persons owning real property within the district whose names appear on the last completed
4 assessment roll of the county.

5 | —(6) Within 30 days after the expiration of the protest period, the board of county
6 commissioners may in its discretion adopt the resolution creating the zoning district or
7 establishing the zoning regulations for the district. However, if 40% of the real property owners
8 within the district whose names appear on the last completed assessment roll or if real property
9 owners representing 50% of the titled property ownership whose property is taxed for agricultural
10 purposes under 15-7-202 or whose property is taxed as forest land under Title 15, chapter 44,
11 part 1, have protested the establishment of the district or adoption of the regulations, the board of
12 county commissioners may not adopt the resolution and a further zoning resolution may not be
13 proposed for the district for a period of 1 year."

14
15 | NEW SECTION. Section 11. {standard} Codification instruction. [Sections 1, 2, and 4
16 through 9] are intended to be codified as an integral part of:

17 | (1) Title 76, chapter 2, part 1, and the provisions of Title 76, chapter 2, part 1, apply to
18 [sections 1, 2, and 4 through 9]; and

19 | (2) Title 76, chapter 2, part 2, and the provisions of Title 76, chapter 2, part 2, apply to
20 [sections 1, 2, and 4 through 9].

21
22 | NEW SECTION. Section 12. {standard} Contingent effective date. [This act] becomes
23 effective on the date that the clerk of the Montana supreme court notifies the code commissioner
24 that the Montana supreme court has declared the protest provisions of 76-2-101 or 76-2-205 to
25 be unconstitutional.

26 | - END -

Deleted: NEW SECTION. **Section 11. Protest.** (1) Within 60 days of the date notice of the resolution of intention to adopt a proposed zoning action is first published, affected property owners may protest the proposed zoning action by delivering written notification to the board of county commissioners.¶

(2) If a successful protest is not achieved, the board of county commissioners may in its discretion proceed with the proposed zoning action within 30 days of the expiration of the protest period.¶

¶ **NEW SECTION. Section 12. Override of successful protest.**

(1) Following a successful protest, a board of county commissioners may in its discretion either abandon the proposed zoning action or, subject to the protest override procedures set forth in [sections 6 through 9], override a successful protest and adopt the proposed zoning action by a vote subject to the provisions of [section 6(1)]. A commissioner may not abstain from voting unless a proven conflict of interest exists.¶

(2) If the protest override procedure is not successful, the board of county commissioners may not adopt the proposed zoning action and a subsequent zoning proposal may not be proposed for the affected property for a period of 1 year.¶

(3) Prior to holding a vote to override a successful protest, a board of county commissioners must comply with the protest override procedures provided in [sections 6 through 9].¶

(4) The written findings of fact provided by the board of county commissioners pursuant to [section 9] may be appealed pursuant to 76-2-226 and 76-2-227. An affected property owner has 30 days from the date the affected property owner receives notice of the written findings to appeal.¶

¶ **NEW SECTION. Section 13. Unfunded mandate laws superseded.** The provisions of [this act] expressly supersede and n ... [1]

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NEW SECTION. **Section 11. Protest.** (1) Within 60 days of the date notice of the resolution of intention to adopt a proposed zoning action is first published, affected property owners may protest the proposed zoning action by delivering written notification to the board of county commissioners.

(2) If a successful protest is not achieved, the board of county commissioners may in its discretion proceed with the proposed zoning action within 30 days of the expiration of the protest period.

NEW SECTION. **Section 12. Override of successful protest.** (1) Following a successful protest, a board of county commissioners may in its discretion either abandon the proposed zoning action or, subject to the protest override procedures set forth in [sections 6 through 9], override a successful protest and adopt the proposed zoning action by a vote subject to the provisions of [section 6(1)]. A commissioner may not abstain from voting unless a proven conflict of interest exists.

(2) If the protest override procedure is not successful, the board of county commissioners may not adopt the proposed zoning action and a subsequent zoning proposal may not be proposed for the affected property for a period of 1 year.

(3) Prior to holding a vote to override a successful protest, a board of county commissioners must comply with the protest override procedures provided in [sections 6 through 9].

(4) The written findings of fact provided by the board of county commissioners pursuant to [section 9] may be appealed pursuant to 76-2-226 and 76-2-227. An affected property owner has 30 days from the date the affected property owner receives notice of the written findings to appeal.

~~NEW SECTION. **Section 13. Unfunded mandate laws superseded.** The provisions of [this act] expressly supersede and modify the requirements of 1-2-112 through 1-2-116.~~

NEW SECTION. **Section 13. Codification instruction.** (1) [Sections 1, 2, and 4 through 9] are intended to be codified as an integral part of Title 76, chapter 2, part 1, and the provisions of Title 76, chapter 2, part 1, apply to [sections 1, 2, and 4 through 9].

(2) [Sections 11 and 12] are intended to be codified as an integral part of Title 76, chapter 2, part 2, and the provisions of Title 76, chapter 2, part 2, apply to [sections 11 and 12].